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## YALE SCHOOL OF LAW ALUMNI ASSOCIATION

Through the earnest efforts of some very loyal alumni of the Law School, a movement has been started which should be of the greatest benefit to Yale and to the School. The formation of a Yale School of Law Alumni Association at the Yale Club in New York early in December has been closely followed by a campaign for membership among not only graduates of the School, but also all Yale men in law, and the response during the first month has been most encouraging.

The JOURNAL has some selfish interest in the campaign, for membership in the association will carry with it a year's subscription, and a portion of the annual dues will therefore come to our treasury. We have been running at a deficit, and it is only by an increase in the circulation that we can hope to support ourselves without aid from the University.

But it is on behalf of the School, and because of the benefits to it,

rather than on account of our own interest, that we enlist our hearty good wishes and earnest coöperation in this cause. We believe, and must express our belief, that our School offers as fine a legal education as any in the country. When the other great schools are crowded to capacity, we think it most proper that the opportunity at Yale should be better known, particularly to Yale men. We therefore urge the support of this association by all Yale men in law. Particularly do we urge upon the students in the School a realization of their obligation to their legal alma mater; we ask their coöperation so far as in them lies at the present time, and not less when they leave the School for the bar.

### PROFIT ON INVESTMENTS AS TAXABLE INCOME

An income tax question of no less importance than that involved in the stock dividend case[1] has recently been decided by Judge Thomas of the District Court of the United States for the District of Connecticut, and will shortly be passed upon by the Supreme Court. *Brewster v. Walsh, Collector* (Dec. 16, 1920) U. S. D. C., D. Conn., No. 2133.[2] The problem presented is whether appreciation in value of an investment, realized by sale, is income of the individual investor in such sense as to be subject to federal taxation. That the federal government has been collecting such taxes is known to all; but economists as well as lawyers have not been agreed as to the validity of them, and a judicial expression of opinion on the point has been eagerly awaited. Judge Thomas' decision that such profits are not taxable has consequently aroused much comment both in financial journals and in the daily press.

The facts of the case can be stated briefly. Prior to the effective date of the Sixteenth Amendment,[3] Mr. Brewster, who was not a trader in securities, had purchased for investment certain bonds. He sold these bonds in 1916, part of them at exactly their cost price, others

[1] *Eisner v. Macomber* (1920) 252 U. S. 189, 40 Sup. Ct. 189; see articles in (1920) 29 YALE LAW JOURNAL, 735; (1920) 33 HARV. L. REV. 885; (1920) 20 COL. L. REV. 536; (1920) 14 AM. POL. SCI. REV. 635; (1920) 5 BULL. NAT. TAX ASSN. 201, 208, 247.

[2] The case is to be taken to the United States Supreme Court. The day after Judge Thomas' decision, a judgment for the government was rendered on demurrer by Judge Hand in a case involving the same point. *Goodrich v. Edwards* (Dec. 17, 1920, U. S. D. C. S. D. N. Y.) This case has also been appealed. The question of the taxability of capital increment realized by sale by a trustee who held securities for life-tenant and remainderman was argued before the Supreme Court on Jan. 11, 1921, in *Merchants' Loan & Trust Co. v. Smietanka,* Oct. Term, 1920, No. 608.

[3] March 1, 1913. The text of the Sixteenth Amendment reads: "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration."

at a slight advance over cost. But in each case the sale price was considerably more than the market value of the bonds on March 1, 1913. Such gains over the market value of March 1, 1913, were assessed as income for the year 1916.[4] The tax thereon was paid under protest and suit was brought for its recovery. Judgment was given for the plaintiff on the ground that such realized increment in value was not "income" within the meaning of the term as used in the Sixteenth Amendment, and therefore the tax thereon violated the constitutional requirement that direct taxes shall be apportioned according to population.[5]

To draw a line between what is capital and what is income is a task which baffles economists no less than lawyers.[6] The Supreme Court would have saved itself many troublesome questions could it have left Congress a free hand to make its own definition of income for purposes of taxation. But such a course has been foreclosed. In *Eisner v. Macomber* Mr. Justice Pitney, in discussing the scope of the Amendment, said:[7]

"In order, therefore, that the clauses cited from Article 1 of the Constitution may have proper force and effect, save only as modified by the Amendment, and that the latter also may have proper effect, it becomes essential to distinguish between what is and what is not 'income,' as the term is there used, and to apply the distinction, as cases arise, according to truth and substance, without regard to form. Congress cannot by any definition it may adopt conclude the matter. . . ."

With respect to stock dividends and with respect to judges' salaries[8] the court has overturned the Congressional definition of taxable income. It is clear, therefore, that taxes upon profits realized on the sale of securities cannot stand if the Court shall be of opinion that "according to truth and substance" such profits are not income.

Increase in value of capital, before it is realized by sale, is con-

[4] Unquestionably the Revenue Act of 1916 (39 Stat. at L. ch. 463, p. 756) purports to tax such gains. Sec. 1 (a) lays a tax upon "the entire net income received in the preceding calendar year from all sources by every individual." Sec. 2 (a) declares that the net income of a taxable person "shall include gains, profits and income derived from . . . sales, or dealings in property." Sec. 2 (c) provides that "for the purpose of ascertaining the gain derived from the sale or other disposition of property . . . acquired before March 1, 1913, the fair market price or value of such property as of March 1, 1913, shall be the basis for determining the amount of such gain derived."

The Revenue Act of 1918, sec. 213 (Act of Feb. 24, 1919) similarly includes such "gains" as income. Sec. 214 permits the deduction of losses on investments realized by sale.

[5] U. S. Const. Art. 1, sec. 2, clause 3, and sec. 9, clause 4.

[6] See *Some Income Tax Problems* (1920) 29 YALE LAW JOURNAL, 735, and citations in the notes thereto.

[7] 40 Sup. Ct. 189, at 193.

[8] *Evans v. Gore* (1920, U. S.) 40 Sup. Ct. 550; for criticisms of this decision see (1920) 30 YALE LAW JOURNAL, 75; (1920) 6 AM. BAR. ASSO. J. 202.

cededly not income.[9] So long as an item of property continues in the same ownership, appreciation in its value is not income to the owner, but when the owner exchanges the article for another of equal value, or for money, then such appreciation in value, which had previously been deemed capital, becomes on the instant income and only so much of the value as represents the original cost of the article or its value on March 1, 1913, continues to remain capital—this is the position of the advocates of the taxability of capital gains. Whatever else may be said of it, it can scarcely be called logical.[10] Advocates of either view, however, can find aid and comfort in the language of Supreme Court opinions.

In a case which arose under the Income Tax Law of 1867, Mr. Justice Field declared:[11]

"The question presented is whether the advance in value of the bonds, during this period of four years, over their cost, realized by their sale, was subject to taxation as gains, profits, or income of the plaintiff for the year in which the bonds were sold. . . ."

"The mere fact that property has advanced in value between the date of its acquisition and sale does not authorize the imposition of the tax on the amount of the advance. Mere advance in value in no sense constitutes the gains, profits, or income specified by the statute. It constitutes and can be treated merely as an increase of capital."

Respecting this decision, the Supreme Court, by Mr. Justice McKenna, has recently stated that, "This case has not been since questioned or modified."[12]

On the other hand, Mr. Justice Pitney, in the course of his opinion in *Eisner v. Macomber,* said:[13]

"It is said that a stockholder may sell the new shares acquired in the stock dividend; and so he may, if he can find a buyer. It is equally true that if he does sell, and in doing so realizes a profit, such profit, like any other, is income, and so far as it may have arisen since the Sixteenth Amendment is taxable by Congress without apportionment. The same would be true were he to sell some of his original shares at a profit."

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[9] In *Eisner v. Macomber, supra* note 1, at p. 193, Mr. Justice Pitney, in discussing the definition of income, says (italics are his): "the *gain—derived—from—capital,* etc. Here we have the essential matter: *not a* gain *accruing to* capital; not a *growth* or *increment* of value in the investment; but a gain, a profit, something of exchangeable value, *proceeding from* the property, *severed from* the capital, however invested or employed, and *coming in,* being *"derived"*—that is, *received* or *drawn by* the recipient (the taxpayer) for his *separate* use, benefit and disposal—*that* is income derived from property."

[10] For criticism by an economist, see *Federal Taxation of Income and Profits,* a paper read before the American Economic Association at its annual meeting, December 29, 1920, and shortly to be published in the AM. ECON. REV. For a discussion favoring the tax see (1920) 29 YALE LAW JOURNAL, 738-741.

[11] *Gray v. Darlington* (1872, U. S.) 15 Wall. 63, 65 and 66.

[12] *Lynch v. Turrish* (1918) 247 U. S. 221, 230, 38 Sup. Ct. 537, 539.

[13] 40 Sup. Ct. 189, 195.

These statements, however, are treated by Judge Thomas as dicta[14] which must be confined in their application to traders in stocks, or else be treated as contradictory to the decision in *Gray v. Darlington,* and of inferior authority. Other cases[15] relied upon by the government, wherein it was held that gains realized by sale formed part of the corporation's income taxable under the Corporation Tax Act of 1909, are distinguished because this Act imposed not an income but an excise tax.[16]

The argument against the taxability of realized capital appreciation finds further support in the construction of the British Income Tax Act[17] and in cases involving securities held on trust for life-beneficiary and remainderman.[18] As between life tenant and remainderman, it is clear that capital increment still remains capital after realization by sale. If an income tax is assessed upon such increment, who is to pay it? Not the life-tenant, it would seem, for he has not received and will not receive the increment—unless its reinvestment by the trustee can be deemed a receipt by the life-tenant; nor the remainderman, for he has not received it and may never do so. If the trustee is deemed to have received taxable income, his payment of the tax necessarily reduces money which he holds solely for investment, that is, as capital.[19] The tax, if paid, must come out of property which all parties consider, and are required by law to consider, as capital. With regard to securities held on trust, therefore, sale for reinvestment should not be held to sever increment from capital so as to make it income for purposes of taxation. With respect to profits realized by an individual investor, he would be a bold man who would predict, with assurance, what the Supreme Court decision will be, but it is believed

[14] It is unofficially reported that in the argument of *Merchants' Loan and Trust Co. v. Smietanka, supra* note 2, when this language in the *Macomber* opinion was being pressed upon the court, Mr. Justice Pitney stated from the bench that counsel might consider it as dictum.

[15] *Doyle v. Mitchell Bros. Co.* (1918) 247 U. S. 179, 38 Sup. Ct. 467; *Hays v. Gauley Mountain Coal Co.* (1918) 247 U. S. 189, 38 Sup. Ct. 470; *Southern Pac. Co. v. Lowe* (1918) 247 U. S. 330, 38 Sup. Ct. 540.

[16] *Stratton's Independence v. Howbert* (1913) 231 U. S. 399, 404, 34 Sup. Ct. 136; *Anderson v. Forty-two Broadway Co.* (1915) 239 U. S. 69, 36 Sup. Ct. 7.

[17] See *Tebrau Rubber Syndicate v. Farmer* (1910) 47 Scot. L. R. 816, at 819: "It is well settled that in such a case the profit is not part of the person's annual income liable to be assessed for income tax but results from an appreciation of his capital. No doubt if it is part of his business to deal in land or investments, any profits which in the course of that business he realizes form part of his income; . . ."

[18] *Boardman v. Mansfield* (1907) 79 Conn. 634, 66 Atl. 169; *Smith v. Hooper* (1902) 95 Md. 16, 51 Atl. 844; *Jordan v. Jordan* (1906) 192 Mass. 337, 78 N. E. 459; *Gibbons v. Mahon* (1890) 136 U. S. 549, 10 Sup. Ct. 1057.

[19] In *Merchants' Loan & Trust Co. v. Smietanka,* referred to in note 2 *supra,* appellant's brief contains the argument that, even if capital appreciation realized by an individual be deemed taxable income, sec. 2 (b) of the Revenue Act of 1916 cannot properly be construed as intended to impose such a tax upon a trustee.

that the judgment in the *Brewster* Case should be affirmed.[20] As to those bonds which were sold at cost, it seems particularly difficult to say that the increment above market value on March 1, 1913, is income. Even if the meaning of "income" in the Amendment be deemed broad enough to include a realized profit over cost, it is not likely to be stretched to cover appreciation in value which simply offsets a previous decrease and actually represents no profit over cost. Judge Thomas found it unnecessary to pass upon this point because of his broader holding that realized profit on investments was not taxable income.

Affirmance by the Supreme Court would, of course, destroy a large source of revenue from income taxes. On the other hand it would justify the repeal of the provision which permits the deduction of losses from sale of investments.[21] The economic effect of the existing practice of taxing gains and allowing deduction of losses is undoubtedly bad. It deters the tax payer from realizing gains, and furnishes an incentive to realize losses and to withdraw capital from business enterprise for the purpose of investment in tax-exempt securities.[22] This is particularly true in the case of taxpayers of large income where such deduction may effect the rate of surtax. As is well known, it is common practice to sell investments for the very purpose of realizing a loss for income tax purposes, and to repurchase immediately the same securities. It may be doubted, therefore, whether the actual loss of revenue would be as great as is anticipated, if capital losses as well as capital gains were both excluded from consideration.

T. W. S.

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[20] For discussion of an analogous problem, see McCamic, *Appreciation in Value as Invested Capital under the Excess Profits Law* (1920) 30 YALE LAW JOURNAL, 239.

[21] The Income Tax Law of 1913, except in the case of a trader, did not permit realized investment losses to be deducted from income. See *Mente v. Eisner* (1920, C. C. A. 2d) 266 Fed. 161, discussed in (1920) 34 HARV. L. REV. 220.

The Revenue Act of 1916 permitted such losses to be offset only to the extent of realized investment gains. In effect this treats them as capital losses, for if they were income losses they should be taken into account in determining "net income" which the Act purports to tax.

The Revenue Act of 1918, sec. 214, permits the tax payer to offset against his entire income realized investment losses.

[22] The *ratio decidendi* of *Evans v. Gore,* note 8 *supra,* makes it certain that income from state and municipal bonds is tax-exempt. The existence of millions of dollars of tax-exempt securities is the most vicious feature of our entire scheme of income taxation. Unfortunately, there seems no way to meet it but by a constitutional amendment doing away with the necessity for apportionment in direct taxes—unless the Supreme Court will recant the views expressed in *Evans v. Gore.* An unanswerable criticism of that decision may be found in Mr. Harry Hubbard's article *From Whatever Source Derived* (1920) 6 AM. BAR. ASSO. J. 220. The economic evils are discussed by Mr. Otto H. Kahn in *Two Years of Faulty Taxation* (1920) 10-32 and *Some Suggestions on Tax Revision* (1920) 12-20.

## SUICIDE AS A DEFENSE IN LIFE INSURANCE

At last the unfortunate decision of the Supreme Court of the United States in *Ritter v. Mutual Life Ins. Co.*[1] will cease to trouble lawyers and underwriters and to mislead courts. In *Northwestern Mutual Life Ins. Co. v. Johnson* and *National Life Ins. Co. v. Miller*,[2] recently decided by the Supreme Court, the Ritter Case was tacitly repudiated by that process of casual reference which Mr. Justice Holmes uses so gracefully. No one could complain of the result actually reached in the Ritter Case; for, as Mr. Justice Holmes remarks, "all the circumstances gave moral support to the construction of the policy adopted by the court." The court might well have decided that the policies involved in that famous case were avoided by the fraudulent conduct of the insured in taking out insurance in an excessive amount, with the wrongful intent of bringing the policies to an untimely maturity by ending his own life, and thus making good his own heavy defalcations at the expense of the insurance companies.[3] But the state of the record did not permit such a simple disposition of the cause. What the court actually decided was that there was no error in the trial court's instruction to the jury that "There could be no recovery by the estate of a dead man of the amount of policies of insurance upon his life if he takes his life designedly, whilst in sound mind." For upholding this broad statement of the law, the Supreme Court gave two reasons: (1) In the absence of an express exception of sane suicide in any contract of life insurance, such an exception is to be implied; (2) an express provision for payment in case of suicide while sane would be void as opposed to public policy.

This decision has signally failed to secure the support of the state courts. Some have refused outright to accept the decision as sound.[4] Many others have limited its application to policies payable to the insured's estate, and therefore held that no such exception could be implied to defeat the claim of a designated beneficiary other than the insured's personal representatives.[5] It is manifest, however, that such

[1] (1898) 169 U. S. 139, 18 Sup. Ct. 300.

[2] (1920, U. S.) 41 Sup. Ct. 47.

[3] It seems to be universally held that such a fraud will avoid a policy. *Campbell v. Supreme Conclave* (1901) 66 N. J. L. 274, 49 Atl. 550; *Parker v. Des Moines Life Assn.* (1899) 108 Iowa, 117, 78 N. W. 826; *Supreme Conclave Improved Order of Heptasophs v. Miles* (1901) 92 Md. 613, 48 Atl. 845; *Smith v. National Benefit Society* (1890) 123 N. Y. 85, 25 N. E. 197.

[4] See *Campbell v. Supreme Conclave, supra; Patterson v. Natural Premium Life Ins. Co.* (1898) 100 Wis. 118, 7 N. W. 980; *Lange v. Royal Highlanders* (1905) 75 Neb. 188, 106 N. W. 224, 110 N. W. 1110.

[5] *Grand Legion v. Beatty* (1906) 224 Ill. 346, 99 N. E. 565, 8 L. R. A. (N. S.) 1124, note; *Shipman v. Protected Home Circle* (1903) 174 N. Y. 398, 67 N. E. 83; *Parker v. Des Moines Life Assn., supra* note 3; *Morris v. State Mut. Life Assur. Co.* (1898) 183 Pa. 563, 39 Atl. 52. Recovery in such cases is allowed to the third party beneficiary on the ground that such beneficiary has

a limitation of the rule announced in the Ritter Case is indefensible; and this is recognized by the Supreme Court in *Northwestern Mutual Life Ins. Co. v. McCue,*[6] in which it is properly said with reference to the analogous implied exception of death by legal execution, that "the policy is the measure of the rights of everybody under it." If suicide is a risk not covered by the policy, the rights of the third party beneficiary claiming under it are no greater than those of the insured's estate.[7] Hence all cases allowing recovery to a designated beneficiary virtually repudiate the Ritter Case.

It is believed that the doctrine of the Ritter Case has been fully accepted in only one of the American states.[8] Even in Alabama, which furnished the sole American precedent for the Ritter Case,[9] the supreme court of the state, while still rendering lip service, has virtually repudiated it.[10] So deep-seated is the revolt against the doctrine that in no fewer than four states statutes have been passed prohibiting, either absolutely or with qualifications, the setting up of suicide as a defense in actions on insurance policies.[11] In Georgia, in spite of a statute of long standing which declares that sane suicide avoids a life insurance policy, it has been held that no such public policy is involved as will preclude the insurer from waiving the benefit of the statute and expressly contracting to pay in case of the insured's suicide.[12]

With the authorities in such a state it is not to be wondered that the Circuit Court of Appeals for the Eighth Circuit should have

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a vested right in the policy which can not be defeated by the sole act of the insured. In a few cases it is held that the beneficiary named in a mutual benefit certificate, not having a vested interest in the contract, is subject to the defense of suicide to the same extent as the personal representative of the insured. See *Shipman v. Protected Home Circle, supra,* and *Davis v. Supreme Council Royal Arcanum* (1907) 195 Mass. 402, 81 N. E. 294.

[6] (1912) 223 U. S. 234, 32 Sup. Ct. 220.

[7] *Campbell v. Supreme Conclave, supra* note 4; *Davis v. Supreme Council Royal Arcanum, supra; Security Life Ins. Co. v. Dillard* (1915) 117 Va. 401, 84 S. E. 656, Ann. Cas. 1917 D, 1187, note; *Hopkins v. Northwestern Mut. Life Ins. Co.* (1899, C. C. E. D. Pa.) 94 Fed. 729.

[8] *Security Life Insurance Co. v. Dillard, supra.* See also *Shipman v. Protected Home Circle, supra* note 5.

[9] *Supreme Commandery v. Ainsworth* (1882) 71 Ala. 436.

[10] See the interesting case of *Mutual Life Ins. Co. v. Lovejoy* (1917) 201 Ala. 337, 78 So. 299, L. R. A. 1918 D, 860, note, determined by a divided court on a rehearing, reversing a previous opinion.

[11] Missouri, Rev. St. 1909, sec. 6945, construed in *Whitfield v. Aetna Life Ins. Co.* (1907) 205 U. S. 489, 27 Sup. Ct. 578; *Applegate v. Travelers' Ins. Co.* (1910) 153 Mo. App. 63, 132 S. W. 2; Colorado, Laws 1903, ch. 119, declared constitutional in *Head Camp v. Sloss* (1910) 49 Colo. 177, 112 Pac. 49, 31 L. R. A. (N. S.) 831, note; North Dakota, Rev. Codes 1905, sec. 6064, construed in *Harrington v. Mut. Life Ins. Co.* (1911) 21 N. D. 447, 131 N. W. 246; Texas, Vernon's Sayles' Ann. Civ. St. 1914, art. 174, discussed in *Floyd v. Ill. Bankers' Life Assn.* (1917, Tex. Civ. App.) 192 S. W. 607.

[12] *Mut. Life Ins. Co. v. Durden* (1911) 7 Ga. App. 797, 72 S. E. 295.

thought it advisable to inquire of the Supreme Court as to what rule of law was applicable to two cases pending before it. In the first of these cases, *Northwestern Mutual Life Ins. Co. v. Johnson,* the policy in suit, granted upon the life of one Johnson, and payable to his wife, contained a provision that "if within two years from the date hereof, the said insured shall, . . . while sane or insane, die by his own hand, then, and every such case, this policy shall be void"; while the second, on the same life and payable to the insured's estate, was silent as to suicide, but contained the usual clause declaring it to be incontestable after one year from the date of its issue. Johnson died by his own hand while sane, more than two years after the policies had been issued. The court held that the effect of the incontestable clause was the same as if an express undertaking to pay in case of suicide had been inserted in the policy,[13] and that the provision above quoted in the first policy was but "an inverted expression of the same general intent"; that "both equally mean that suicide of the insured, sane or insane, after the specified time shall not be a defense." By reaching this conclusion the court by inference distinguished the Ritter Case, in so far as it rested upon the doctrine of implied exception, which was declared to be the real basis of the decision. It only remained to declare in the light of the Whitfield Case,[14] that the question of the validity of an express undertaking to pay in case of suicide depends on the policy of each state, and then by one bold and long step, to hold that unless the state concerned had taken a different attitude, the Court would uphold such an undertaking. In the absence of any showing as to the policy of the states concerned in these contracts, or, indeed, as to what states were concerned, the Court obligingly determined the policy of the unknown states for them and declared the insurer liable in each case.

The opinion does not expressly overrule the Ritter Case, and it can, and doubtless will be, argued that it leaves undisturbed the doctrine established in that case to the effect that there is an implied exception of death by suicide when sane in every policy which does not, by way of incontestable clause or otherwise, contain an express provision concerning suicide. But such arguments will not prevail. It is a

[13] A very different interpretation of a similar incontestable clause was arrived at in *Mutual Life Ins. Co. v. Lovejoy, supra* note 10. Here the court assumed that an express promise to pay in case of death by suicide while sane would be void as contrary to public policy, but held that it was nevertheless competent for the insurer to *waive* the defense by inserting the incontestable clause in its policy. It is generally held that the incontestable clause cuts off the defense not only when the policy is silent as to suicide, but also when it contains an express exception of death by self destruction. *Mut. Life Ins. Co. v. Durden, supra; Goodwin v. Provident Savings Life Ins. Co.* (1896) 97 Iowa, 226, 66 N. W. 157; *Harrington v. Mut. Life Ins. Co., supra* note 11; *Krebs v. Phila. Life Ins. Co.* (1915) 249 Pa. 330, 95 Atl. 91; *Silliman v. International Ins. Co.* (1915) 13 Tenn. 303, 174 S. W. 113; *Mutual Reserve Fund Life Assn. v. Payne* (1895, Tex. Civ. App.) 32 S. W. 1063.

[14] *Whitfield v. Aetna Life Ins. Co., supra* note 11.

strangely inconclusive opinion to come from the pen of Mr. Justice Holmes, but it has put an end to the misconceived doctrine of the Ritter Case.

The opinion in the principal cases makes reference without comment to *Northwestern Mutual Life Ins. Co. v. McCue*,[15] in which it was held that public policy required a similar implied exception of death by execution upon conviction of crime, and to *Burt v. Central Life Ins. Co.*,[16] in which the Court refused to allow the admission of evidence that the insured was innocent of the crime for which he was executed. These cases appear to be supported by some respectable English authority having a very different historical background,[17] but they rest principally upon the reasoning of the opinion in the Ritter Case, now so thoroughly discredited. They stand upon a far more infirm foundation than the Ritter Case, and are repugnant to the simplest principles of common justice, and even common sense. It is to be hoped that they too may soon be relegated to innocuous desuetude along with the Ritter Case.

W. R. V.

PRESENT DAY LABOR LITIGATION

After disposing of the question as to whether or not a given strike has a justified object, as discussed in a previous comment,[1] we are next confronted by the question as to whether legal methods are employed in the furtherance of the strike. The strike may be for a lawful object, yet the means used may be declared illegal. This is a common occurrence in labor litigation and it is well to realize wherein these two situations differ.

It has previously been shown that practically any concerted action by the employees against their employers constitutes a prima facie tort requiring justification. This justification consists in having as the object of the strike certain ends which the courts have gradually come to recognize as legitimate, thus creating a privilege to do something that is prima facie tortious. But there is no prima facie case against the employee with respect to the means used; if a strike is for a lawful object, the burden is on the plaintiff to show unlawful means. Thus either illegal means or an illegal object will give rise to a cause of action.[2]

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[15] (1912) 223 U. S. 234, 32 Sup. Ct. 220.

[16] (1902) 187 U. S. 362, 27 Sup. Ct. 139.

[17] *Amicable Society v. Bolland* (1830, H. L.) 4 Bligh (N. R.) 194. In Collins *v. Metropolitan Life Ins. Co.* (1907) 232 Ill. 37, 83 N. E. 542, 14 L. R. A. (N. S.) 356, note, it is clearly shown that at the time of the decision of this case forfeiture upon conviction of felony was still in force in England. It therefore affords an unsafe precedent in the United States, where such forfeitures are unknown.

[1] COMMENTS (1921) 30 YALE LAW JOURNAL, 280.

[2] *Willcutt v. Driscoll* (1908) 200 Mass. 110, 85 N. E. 897; *Schwarcs v. International Union* (1910, Sup. Ct.) 68 Misc. 528, 124 N. Y. Supp. 968.

The effect of this is important. Where a group of employees strikes against an employer B, it is very seldom that B can have the strike restrained because of its object,[3] but he is entitled to a remedy if illegal means are used. Thus trade competition will excuse or justify a strike, but it will not excuse certain wrongful hostile acts. Where A strikes against B to obtain shorter hours, B has no cause of action. But if A pickets B's plant and threatens those seeking employment from B, the latter is entitled to the aid of the courts. Extend this situation, so that A, striking against B, by peaceful persuasion induces C to strike against D to compel D to refrain from dealing with B. B again has no cause of action against A. But if A compels C by means of fines or compulsion of some other kind to take such measures, then B has an action against A because A has used illegal means.

The usual weapons which A uses, in addition to the strike, are those suggested above—picketing and boycotting.[4] Various other means involving a breach of the peace are also employed, but these are not in controversy, for their illegality is firmly established. The question of picketing is often before the courts and has been much disputed, and as a result we have two opposing lines of authority. The minority hold picketing to be illegal *per se,* while the majority hold it to be legitimate.

The courts which declare picketing illegal *per se* do so because they maintain that picketing and intimidation are inseparably bound together. Were it possible to have "peaceful" picketing, they say, it would be legal, but this is a thing impossible.[5] The tendency of the

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[3] *Lehigh Steel Co. v. Refining Works* (1920, N. J. Ch.) 111 Atl. 376.

[4] Boycotting is here classified as a "means" in accordance with the usual legal analysis of this subject. This classification is questioned below, however, as leading to confusion rather than to clear thinking, and it is there suggested that a change would be beneficial.

[5] The following cases illustrate the position of those courts that hold picketing to be illegal *per se. Jonas Glass Co. v. Glass Blowers' Assn.* (1907) 72 N. J. Eq. 653, 66 Atl. 953, affirmed in (1910) 77 N. J. Eq. 219, 79 Atl. 262, and followed in *Baldwin Co. v. Local No. 560* (1920, N. J. Ch.) 109 Atl. 147; *Rosenberg v. Retail Clerks' Assn.* (1918, Calif. App.) 177 Pac. 864; *Barnes v. Typographical Union* (1908) 232 Ill. 424, 83 N. E. 940. In the Barnes Case it is said: "It is contended that a peaceful picket line around a shop is entirely lawful. But this court has held otherwise. . . . The very fact of establishing a picket line is evidence of an intention to annoy, embarrass and intimidate, whether physical violence is resorted to or not. . . . Any picket line must result in annoyance both to the employer and the workmen, no matter what is said or done, and to say that the court is to determine by the degree of annoyance whether it shall be stopped or not would furnish no guide, but leave the question to the individual notions or bias of the particular judge." The court in *Atchison v. Gee* (1905, C. C. S. D. Iowa) 139 Fed. 582, states its position very firmly: "There is and can be no such thing as peaceful picketing, any more than there can be chaste vulgarity, or peaceful mobbing, or lawful lynching." In *Pierce v. Stablemen's Union* (1909) 156 Calif. 70, 103 Pac. 324, it is stated that "Many peaceful citizens,

greater number of the courts is to give the word "picket" the same meaning which it has in a military sense, namely, stationing a person to observe certain movements. But some courts hold that it also means to annoy or prevent the approach of others. This is the view of those courts that declare it to be illegal *per se*.[6]

The generally accepted view is that picketing is not illegal *per se*, but that some further accompanying act, illegal in its nature, is necessary before it will be declared illegal. What is the real distinction between the two ideas? Both groups agree that theoretically peaceful picketing is legal. But the first group holds that actually there can be no picketing without intimidation. The second group seems tacitly to admit that while there may be present a certain measure of intimidation, it is not such as necessarily to make the act illegal. Consequently each case must stand on its merits and peculiar circumstances, and it thus becomes a question of fact to be determined by the court as to the presence of intimidation.[7] Some jurisdictions have enacted statutes

men and women, are always deterred by physical trepidation from entering places of business so under a boycott patrol. It is idle to split hairs upon so plain a proposition, and to say that the picket may consist of nothing more than a single individual peacefully endeavoring by persuasion to prevent customers from entering the boycotted place. The plain facts are always at variance with such refinements of reason." In the case of *St. Germain v. Bakery Union* (1917) 97 Wash. 282, 166 Pac. 665, the court held that the intention of picketing was to intimidate: "Whether the picketing was peaceable or otherwise, under the facts in this case, is entirely immaterial, because the sole object of the respondents was to intimidate, not only the public, but also these appellants [employers], and force them to enter into a contract which they were unwilling to enter into."

[6] "It will not do to say that these pickets are thrown out for the purpose of peaceable argument and persuasion. They are intended to intimidate and coerce. As applied to cases of this character, the lexicographers thus define the word 'picket': 'A body of men belonging to a trades union sent to watch and annoy men working in a shop not belonging to the union, or against which a strike is in progress.' Cent. Dict.; Webst. Dict. The word originally had no such meaning. This definition is the result of what has been done under it, and the common application that has been made of it." *Beck v. Teamsters' Protective Union* (1898) 118 Mich. 497, 77 N. W. 13, followed in *Clarage v. Luphringer* (1918) 202 Mich. 612, 168 N. W. 440. See *Jones v. Van Winkle Machine Works* (1908) 131 Ga. 336, 62 S. E. 236, for discussion as to distinction between inducement and force.

[7] Since there can be no strict lines laid down for such a rule, one must agree with the court in *Waddey Co. v. Richmond Union* (1906) 105 Va. 188, 53 S. E. 273, when it says: "'Picketing' is one of the methods usually adopted by 'strikers' in furthering their purposes, and here, as in the matter of argument and persuation, they have a right to pursue that method, so long as its use does not become unlawful." For an excellent discussion of the growth of the law in regard to picketing see *Local Union v. Stathakis* (1918) 135 Ark. 86, 205 S. W. 450. A good example of the application of this rule is to be found in *King v. Weiss & Lesh Mfg. Co.* (1920, C. C. A. 6th) 266 Fed. 257, where acts of white strikers, which would intimidate colored workers, are restrained, even though they would not have intimidated white men.

expressly declaring that peaceful picketing is legal, a good indication of the mores of the times.[8]

Another weapon employed by A is the inducement, by persuasion or force, of some unrelated person or group of persons to act so as to bring pressure to bear on B. This may take different forms, but it generally resolves itself into what is ordinarily called a boycott.[9] Such a boycott may have as its aim either one of two things, which we may term a boycott of labor or a boycott of goods. A may induce C not to accept employment from B, and the result is a boycott of labor. Or by inducing C not to work for D, A may compel D to refuse to deal with B, and we have a boycott of goods. The courts do not agree on the rights and privileges in cases of this kind, and consequently there are many conflicting decisions on the point. Originally public opinion generally condemned the boycott; but gradually this attitude was modified until at the present time the tendency seems to be thoroughly to weigh the economic and political interests involved before declaring such actions illegal. The present rule seems to be, that A may use persuasion to induce C to take action against B, but any form of intimidation or coercion is unlawful. And of course it is only in the presence of a trade dispute that such action by A can be lawful, for other-

[8] These acts merely legalize "peaceful picketing," and since the courts hold that there can be no such condition in actual life, they are in somewhat of a quandary and the situation is but little bettered. It is interesting to note the effort of the court in *Heitkemper v. Central Labor Council* (1920, Ore.) 192 Pac. 765 to overcome such a situation. It decided that "the legal right peacefully to picket is largely dependent upon the purpose and interest, and the method and manner in which the picketing is done," and then held that the picketing was illegal because there was no trade dispute. In *Monday Co. v. Automobile Workers* (1920, Wis.) 177 N. W. 867, the court held that a strike for a closed shop was not a dispute "concerning terms or conditions of employment" and so restrained the picketing. In *Dail-Overland Co. v. Willys-Overland, Inc.* (1920, D. C. N. D. Ohio) 263 Fed. 171, it is stated that "This court has repeatedly in this case disclaimed a judgment that picketing per se was lawful. It was ordered and allowed in this case as a convenient means of stabilizing a very uncertain situation. . ."

[9] The so-called "primary boycott," which is merely the combination of persons to cease patronizing some other person with whom they are having a dispute affecting only the two parties involved. There is here practically a perfect analogy to a justifiable strike. In the one case there is a withholding of patronage, while in the latter case there is a withholding of labor, both being to effect the object of the combination. Mr. Justice Van Orsdel in his concurring opinion in *American Federation of Labor v. Buck Stove & Range Co.* (1909) 33 App. D. C. 83, states the general view on this subject: "I conceive it to be the privilege of one man, or a number of men, to individually conclude not to patronize a certain person or corporation. It is also the right of these men to agree together, and to advise others, not to extend such patronage. . . . To this point, there is no conspiracy—no boycott. The word 'boycott' is here used as referring to what is usually understood as the 'secondary boycott'."

wise it would simply be a malicious interference in B's business, which is a violation of a well recognized right.[10]

### THE CRIME OF AIDING A SUICIDE

The criminal guilt to be attached to the abetting of suicide is perhaps as confusing a question as the law can present; and when the aid consists merely in furnishing the means of death if desired, a legal question is presented no less interesting than the ethical problem. In the recent case of *People v. Roberts* (1920, Mich.) 178 N. W. 690, the wife of the accused was hopelessly ill and had tried to commit suicide.

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[10] "It is not wrong for members of a union to cease patronizing any one when they regard it for their interest to do so, but they have no right to compel others to break off business relations with the one from whom they have withdrawn their patronage, and to do this by unlawful means, with the motive of injuring such person. Such means as giving notices which excite the fear or reasonable apprehension of other persons that their business will be injured unless they do break off such relations or cease patronizing another, are wrong and unlawful." *Wilson v. Hey* (1908) 232 Ill. 389, 83 N. E. 928.

"The term 'unfair' as used by organized labor has come to have a meaning well understood. It means that the person so designated is unfriendly to organized labor or that he refuses to recognize its rules and regulations. . . . In Gray v. Bldg. Trades Council, 91 Minn. 171, 97 N. W. 663 . . . it was said that whether a publication that an employer of labor is 'unfair' is or is not unlawful depends on the circumstances of each case, that a notification to customers that plaintiffs are 'unfair' may portend a threat or intimidation, in which case it will constitute a boycott and is unlawful, but that a mere notification of that sort is not a threat, is not unlawful, and that the trial court was in error in that case in enjoining such conduct. . . . The decision in the Gray Case is controlling." *Steffes v. Motion Picture Operators' Union* (1917) 136 Minn. 200, 161 N. W. 524. The privilege to boycott is upheld in *Empire Theatre Co. v. Cloke* (1917) 53 Mont. 183, 163 Pac. 107. The court says that "labor unions are not unlawful in this state; that such unions may publish and pursue a peaceful boycott against any person or enterprise deemed by them to be unfriendly, and that a combination of such unions or their members for such purposes cannot be viewed as a conspiracy. . . . What, then, was the 'threat' conveyed by the acts of the defendants according to the findings. In the last analysis it was that all those who patronized the theatre in defiance of the boycott would themselves be classed as unfriendly and subjected to boycott in their turn, a warning similar to that conveyed by the Lindsay circular, implicit in the Dilno banner, and necessarily involved in every earnest boycott. . . . Every person has the right, singly and in combination with others, to deal or refuse to deal with whom he chooses; to reach his decision in that, as in all other matters, upon or without good reason; to regard as unfriendly all those who, with or without justification, refuse to co-operate or sympathize." Also see *Parkinson Co. v. Building Trades Council* (1908) 154 Calif. 581, 98 Pac. 1027. In the federal courts it is now apparently well settled that a secondary boycott is illegal under the Sherman Anti-trust Law. *Loewe v. Lawlor* (1908) 208 U. S. 274, 28 Sup. Ct. 301, affirmed in (1915) 235 U. S. 522, 35 Sup. Ct. 170. *Duplex Printing Co. v. Deering* (Jan. 3, 1921) U. S. Sup. Ct., Oct Term 1920, No. 45, held that the Clayton Act has made no change in this respect.

After she had begged her husband to give her poison, he mixed Paris Green and water in a cup and placed it within her reach. She drank it and died from the effect of the poison. The husband, confessing his participation to this extent, was held guilty of murder in the first degree.

The court attempted partially to avoid the intricacies of the real question involved by relying upon a statute defining murder by means of poison,[1] for the status of suicide as a crime is apparently unsettled in Michigan. So that the criminal act charged was not aiding suicide but administering poison.

The question is not, however, to be so easily dismissed. Intentionally to cause another's death by poisoning is unquestionably murder in every state, and it is difficult to understand why the statute in question should remove the entire case from consideration in the light of common-law principles. To abet a suicide[2] has been held to be murder in the first degree,[3] murder in the second degree,[4] manslaughter,[5] or no crime at all.[6] The accused supplied the immediate means for his wife to commit suicide, but the act was hers without advice or other encouragement from him, and to convict him of administering poison causing death is to imply a considerable degree of positive and personal participation on his part hardly warranted by the facts.[7] The wording of the statute does not make the administering of poison murder in the first degree; indeed it is only "all murder which shall be perpetrated by

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[1] Mich. Comp. Laws, 1915, sec. 15192: "All murder which shall be perpetrated by means of poison, or lying in wait, or any other kind of wilful, deliberate and premeditated killing . . . shall be deemed murder of the first degree."

[2] There are apparently four classes of abetting in suicide cases; (a) inciting, (b) by a suicide pact, (c) by passive aid, and (d) by non-prevention. The classification of cases according to the degree of criminality does not appear to correspond to the classes of abetting. The English cases are classified nearly in this way.

[3] *Commonwealth v. Bowen* (1816) 13 Mass. 356; *Blackburn v. State* (1872) 23 Ohio, 146; *Reg. v. Alison* (1838, Cent. Cr. Ct.) 8 Car. & P. 418; *Vaux & Ridley's Case* (1665, K. B.) Kelyng, 52; *Reg. v. Stormouth* (1897) 61 J. P. 729; *Reg. v. Jessop* (1887) 10 CRIM. L. MAG. 862; *Rex v. Russell* (1832, K. B.) 1 Moody C. C. 356; *State v. Levelle* (1891) 34 S. C. 120, 13 S. E. 319.

[4] *Commonwealth v. Hicks* (1904) 118 Ky. 637, 82 S. W. 265; *State v. Jones* (1910) 86 S. C. 17, 67 S. E. 160.

[5] *Commonwealth v. Mink* (1877) 123 Mass. 429; *People v. Kent* (1903) 41 Misc. 191, 83 N. Y. Supp. 948; *State v. Webb* (1909) 216 Mo. 378, 115 S. W. 998; *State v. Ludwig* (1879) 70 Mo. 412.

[6] *Grace v. State* (1902) 44 Tex. Cr. App. 101; *Saunders v. State* (1908) 54 Tex. Cr. App. 101. The facts in this latter case are nearly identical with those of the instant decision.

[7] See Larremore, *Suicide and the Law* (1904) 17 HARV. L. REV. 331, 337; see Kenner, *Criminal Liability of an Inciter or Abettor of Suicide* (1905) 61 CENT. L. J. 406; *Commonwealth v. Bowen, supra* note 3, where the jury must have found the advice was the procuring cause of the suicide's death in order to convict the accused.

means of poison," and thus the instant case assumes that murder has been committed and that as the means used was poison, it is murder in the first degree.

But does this not beg the whole question? Can the fundamental problem be solved without facing the issue of what crime suicide is and what criminal responsibility attaches to aiding its consummation?

At common law suicide was undoubtedly self-murder.[8] To force another to kill himself was murder on the part of the compeller, and the doctrine was extended to include suicide due to persuasion, advice, or mutual agreement.[9] But if the abettor were not present at the act which caused the death, then he would be an accessory before the fact and escape punishment, for he could not be tried until the principal was first tried and convicted.[10] The effect of this rule has been avoided, however, by treating the accessory as the principal, whether present or not, on the theory that the act causing death was his act.[11] Abetting a suicide is then murder.

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[8] 1 Hale P. C. 411-417; 2 *id.* 62; 4 Blackstone, *Commentaries*, 95, 189, 190; *Hales v. Petit* (1563, Q. B.) 1 Plowd. 253 (where the opinion of Brown, J., apparently suggested to Shakespeare the grave-diggers' argument about suicide in Hamlet); *Rex v. Dyson* (1823, K. B.) Rus. & Ry. 523; *Commonwealth v. Mink, supra* note 5; see (1914) 49 LAW J. 95; (1891) 55 J. P. 115; Mikell, *Is Suicide Murder* (1903) 3 COL. L. REV. 379, where the subject is very ably reviewed. But American jurisdictions are at complete variance on the subject. For instance, to attempt suicide is a felony, but to succeed no crime at all. *Darrow v. Family Fund Soc.* (1889) 116 N. Y. 542, 22 N. E. 1093; *contra, May v. Pennell* (1906) 101 Me. 516, 64 Atl. 885. Suicide is not a crime in Illinois. *Royal Circle v. Acherrath* (1903) 204 Ill. 549, 68 N. E. 492. See 8 R C. L. 351, where it is suggested that suicide can not be a crime in the United States because of its entailing at common law a forfeiture of goods and a degrading burial. But suicide is probably a *malum in se* and the nature of its penalty does not change the nature of the offense.

[9] See Kenner, *op. cit.* note 7; see 66 L. R. A. 304 for collected cases in point; see 1 Wharton, *Criminal Law* (11th ed. 1912) 744.

[10] *Reg. v. Leddington* (1839, Q. B.) 9 Car. & P. 79; *Rex. v. Russell, supra* note 3; see Kenner, *op. cit.* note 7. The point is discussed in nearly every case of abetting suicide. By statutes in England and several American jurisdictions, advising another to commit suicide is made a substantive indictable offense. See N. Y. Penal Code, 1882, sec. 175; Ark. Rev. St. ch. 44, div. 3, art. 2, sec. 4; Calif. Penal Code, sec. 400; Minn. Comp. Laws, ch. 94, sec. 14; Kan. Comp. Laws, ch. 31, sec. 13, 326; see *Blackburn v. State, supra* note 3. It does not appear in the instant case whether the accused was present or absent when his wife drank the poison.

[11] *Blackburn v. State, supra* note 3. The abolition of the distinction between aiders and accessories in some jurisdictions has made such a party guilty of murder for advising a suicide, whether absent or present at the time of the act, provided the suicide is the result of his advice. *Commonwealth v Hicks, supra* note 4; see 37 Cyc. 521. Such a statute existed in Michigan, although the instant case makes no mention of it. Mich. Comp. Laws, 1857, sec. 9545. It will be noticed, of course, that for the statute to apply, a felony must of necessity have been committed. It is also important to decide whether the act of the suicide is the act of the abettor, or the act of the abettor the act of the suicide. As here, for instance, one might be a crime, but the other no crime at all.

But thus to hold the abettor as principal must not blind us to the important and logical difference between an act and its consequences;[12] for having decided the status of suicide, it would be easy to stretch the "principal's" participation to absurd extremes. Thus the instant case either holds that the "act" of swallowing the poison was the "act" of the accused,[13] or that a close causal connection existed between his act of furnishing the poison and his wife's act of drinking it.[14] Furnishing an instrument to a criminal, if one knows a crime will be committed with it, is perhaps a criminal offence. But unless the "act" contemplated is criminal, what crime has been committed in furnishing the instrument? Or how can the accessory-principal be guilty of a crime when the actual principal is guilty of none, both having done the same "act"?

In any light the instant case has stretched the doctrine of the abettor's guilt to an extraordinary length, and beyond any of its precedents.[15] The court based its decision upon a statute, but its authori-

[12] See Cook, *Act, Intention, and Motive in the Criminal Law* (1917) 26 YALE LAW JOURNAL, 645; the writer makes a careful analysis of the word "act" as defined by the courts and text-writers, and argues forcefully and convincingly for a restriction in the breadth of its meaning. Thus, the word "act" as used by the courts in the present connection, must mean to include its consequences, and that no logical distinction can be made between the act of killing a man and the act of doing something which results (however remotely) in his death. See Salmond, *Jurisprudence* (16th ed. 1920) 327. If we mean by an act a muscular movement that is willed, the theory of holding the accessory as a principal is wholly untenable; but in reliance on the usual elastic meaning of the word convictions are being secured when by exact analysis their lack of legal foundation would be disclosed.

[13] See Withers, *Status of Suicide as a Crime* (1914) 19 VA. L. REV. 641, 645; *Burnett v. People* (1903) 204 Ill. 208, 68 N. E. 505: "The act of the principal is the act of the accessory" and "it becomes immaterial what was the character of the crime committed by the principal or whether there was any crime," for the principal is dead. The instant case cites this decision as authority and its reasoning is exactly analogous although not so explicit. Thus whether suicide is a crime or not is "immaterial." It is sufficient that "administering" poison is murder. By the court's own reasoning one is led to the conclusion that suicide must be murder; for how else does the statute apply? The "act" of the wife in administering poison to herself was the "act" of the accused; if this was not murder, how can he be held guilty?

[14] See (1909) 12 LAW NOTES, 163, where facts similar to those in the instant case are supposed and the present result questioned: "In order for one who incites to suicide to be guilty of murder, a causal connection must exist between the incitement and the suicide." See *State v. Jones, supra* note 4, for a discussion of the necessity of causal connection.

[15] See Larremore, *op. cit.* note 7: "It is doubtful whether the doctrine . . . could be stretched to cover instances where the project of suicide originated with the suicide himself, and the abettor went no further than to encourage and assist." The present decision is based for the most part on *Blackburn v. State, supra* note 3, where there was strong evidence of coercion. But the Ohio court said "It is immaterial whether the party taking the poison took it willingly, intending to commit suicide, or was overcome by force, or overreached by fraud," and the words of that decision are in perfect accord with the holding in the instant

ties, analogy, and reasoning are those of a steady development in the law of suicide. To call it "homicide" and entirely disregard the wilful, independent, intervening suicide of the other party is to ignore the main factor in the case. The result in such a decision may be eminently just and merited, but it is not the sole consideration; the court's reasoning is of material importance, particularly in such a comparatively uncharted phase of the law as suicide, where every decision is likely to mark a definite step.

The incurable suffering of the suicide, as a legal question, could hardly affect the degree of criminality, although perhaps it might palliate the atrocity of the crime from a moral point of view. The life of those to whom life has become a burden is as much to be protected by law as the life of those in its full tide and enjoyment; if discriminations are to be made as to the amount of punishment due, they must be made by executive clemency or legislative provision.[16]

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If one is caught at a distillery, which is ready for operation, does this give rise to the presumption that he operated it? In *Barton v. United States* (1920, C. C. A. 4th) 267 Fed. 174, the court held that the possession of the still would justify the inference that the possession is a guilty possession, as in the case of stolen goods, that the proximity of the accused to the place may by a reasonable inference raise the presumption of possession, and that it consequently becomes incumbent upon the accused to give some explanation of his presence there. It is entirely probable that the portion of the charge of the trial court, which is made the basis for this pronouncement by the Circuit Court of Appeals, was well within the rule which permits the court to comment upon the evidence and to state his opinion thereon. But the appellate court seems to confuse the difference between an inference of fact and a presumption of law. Proximity to the place where the still is situated may be a circumstance from which the jury may infer possession—it is a permissible inference, but it cannot be regarded as a necessary inference which puts the burden of going forward on the accused. Presumptions of fact are derived wholly by means of the common experience of mankind, from the course of nature, and the ordinary habits of society.[1] To hold, in view of this, that proximity to a place where an illicit article is stored gives rise to the presumption of its possession, seems erroneous. Unless the court is establishing a new presumption of law based on policy and convenience, it would seem that the holding in the principal case can not be supported.

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case. In the result, however, if not in the doctrine stated, the present decision is more extreme than any other of its kind. See (1920) 19 MICH. L. REV. 98.

[16] See *Blackburn v. State, supra* note 3; see (1920) 7 VA. L. REV. 147.

[1] Thayer, *A Preliminary Treatise on Evidence* (1898) 549.

The Supreme Court has again refused to uphold the fiction of the corporate entity where the corporation is a mere agent and instrumentality for the violation of the law. *United States v. Lehigh Valley Ry.* (1920, U. S.) 41 Sup. Ct. 104. Some years ago the Lehigh Valley Railroad and its subsidiary, the Lehigh Valley Coal Company, organized the Lehigh Valley Sales Company, the share-holders of which were identical with those of the railroad. The Sales Company then contracted with the Coal Company to purchase all of its coal and not to purchase from anyone else, thus making the Sales Company an agency to evade the Commodities Clause of the Hepburn Act. Following its decision and reasoning in the case of *United States v. Delaware, Lackawanna, and Western Ry.*,[1] the court held that the purchase of the coal by the Sales Company was merely a device to evade the law, and that the contract was therefore void. As the law now stands, it is doubtful whether mere identity of stock ownership in the absence of a contract would have been sufficient to bring the case within the Commodities Clause. The next logical step in "piercing the veil of corporate entity" would seem to be to construe this identity of stockholders as giving the corporation a legal or equitable interest in the commodity.

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In *Hutchins v. Maunder* (1920, K. B.) 37 T. L. R. 72, it was held that putting an automobile with a worn steering gear on the highway was in itself negligence on the part of the owner, although the failure to discover the defect was not negligent;[1] or, as the counsel for the plaintiff said, it was placing on the public highway a "wild beast" and not a "domesticated animal." Hence it would seem that in England motor cars are potential *ferae naturae*. Each "Henry" or "Rolls" may go wild at any moment.[2] Car owners may find themselves in possession of a "wild beastie."[3] Fortunately this dual personality is not recognised in this country, and automobiles are still *ferae domesticae*,[4] though those who indulge in breeding them are liable for any bad habits acquired while they are being raised.[5]

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[1] (1915) 238 U. S. 516, 35 Sup. Ct. 873.

[1] The car had just been purchased second hand, and was being driven by the engineer who recommended the purchase.

[2] The breed in this case was "Rover."

[3] See discussion in *Guzzi v. New York Zoological Soc.* (1920, App. Div.) 182 N. Y. Supp. 257; see 11 L. R. A. (N. S.) 748, note.

[4] See *Allen v. Schultz* (1919) 107 Wash. 393, 181 Pac. 916 (held to be negligence not to have brakes in order). But see *King v. Smythe* (1918) 140 Tenn. 217, 204 S. W. 296 (held, that an automobile was not such a "dangerous agency" as to make the owner "liable . . . irrespective of relationship of master and servant"). Also see *Landry v. Oversen* (1919, Iowa) 174 N. W. 255 (held, that an automobile is not per se a dangerous agency).

[5] See *Johnson v. Cadillac Motor Car Co.* (1919, C. C. A. 2d) 261 Fed. 878 (held, that an automobile manufacturer was liable for damages caused by the breaking off of a defective wheel). See 37 L. R. A. (N. S.) 560, note.